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No. 97-146

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

EMILY DISTAJO, RENATO DISTAJO, CONSTANTINO LAMANDO, MILO LAMANDO, JOSE ALBERTO BRENES, ALVARO GUERRERO, MARIA GUERRERO, WESAM YOUMARAN, LINDA YOUMARAN, LOUIS LOENNECKE, MARY ANN BOOKOUT, MICHAEL JOHNSON, RONALD ROTHMUND, PATRICIA ROTHMUND, JOHN PAPALEO, J.S.P., INC., RAYMOND BICKEL, SANDRA BICKEL, MUSHTAG KANCHWALA, ANVER KANCHWALA and AZIM HEMANI,

*Petitioners,*

vs.

DOCTOR'S ASSOCIATES, INC.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Second Circuit correctly conclude, based on the particular facts of this case, that the District Court did not abuse its discretion in declining to abstain from deciding respondent's petitions to compel arbitration under the Federal Arbitration Act in light of the extensive proceedings regarding respondent's petitions that had occurred in the District Court for over two years and given that the case was before the court on remand from the Second Circuit with instructions directing the District Court to decide petitioners' two remaining defenses to arbitration?

2. Did the Second Circuit correctly conclude, based on the unique procedural history of this case, that the *Rooker-Feldman* doctrine did not deprive the District Court of subject matter jurisdiction to decide respondent's petitions to compel arbitration?

## STATEMENT PURSUANT TO RULE 29.6

Doctor's Associates, Inc. states that it has no parent company and no subsidiaries (other than wholly-owned subsidiaries).

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ON PETITION FOR WRIT OF CERTIORARI
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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

This is one in a series of appeals to the United States Court of Appeals for the Second Circuit and this Court by certain Subway sandwich shop franchisees seeking to avoid their contractual obligation to arbitrate their claims against

respondent Doctor's Associates, Inc. ("DAI"). *See, e.g., Doctor's Associates, Inc. v. Riggs*, No. 96-9141 (2d Cir. June 10, 1997), *cert. pending*, No. 97-141; *Doctor's Associates, Inc. v. Distajo, et al.*, No. 96-7011 (2d Cir. Feb. 24, 1997), *cert. pending*, No. 97-145; *Doctor's Associates, Inc. v. Jabush, et al.*, 89 F.3d 109 (2d Cir. 1996); *Doctor's Associates, Inc. v. Stuart, et al.*, 85 F.3d 975 (2d Cir. 1996); *Doctor's Associates, Inc. v. Distajo, et al.*, 66 F.3d 438 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996) ("*Distajo I*"). *See also Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996). As the Second Circuit observed in its opinion below, "[w]e are not the first panel of this court to encounter an appeal by groups of Subway franchisees, represented by attorney David M. Duree, involving similar -- if not identical -- facts and legal issues regarding arbitration of disputes with DAI." *Doctor's Associates, Inc. v. Distajo, et al.*, 107 F.3d 126, 127 (2d Cir. 1997) ("*Distajo II*").

DAI is the national franchisor of Subway sandwich shops. Petitioners are present or former Subway franchisees who sued DAI in state court and then refused to arbitrate their claims when DAI demanded arbitration in accordance with the standard arbitration clause in the franchise agreement.[1]

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[1] The standard arbitration clause provides substantially as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. Each party will be responsible for their own costs in conjunction with the arbitration proceeding. If Franchisee commences action in any court prior to an arbitrator's final decision on the controversy or claim, then the Franchisee will be responsible for all expenses incurred by the Company and Franchisee in the arbitration and the court proceedings.

This Petition arises from petitioners' steadfast refusal to comply with their contractual obligation to arbitrate their disputes with DAI, and DAI's efforts to enforce those arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA").

1. As the Second Circuit observed below, "[s]ome explanation of the tangled proceedings" in these cases is necessary to an understanding of the issues posed by petitioners' refusal to comply with the terms of their arbitration agreements. *Distajo II,* 107 F.3d at 137. The events giving rise to these cases began with the filing of state court lawsuits by Subway franchisees. In December 1993, a group of Subway franchisees filed lawsuits in the Circuit Court of Madison County, Illinois, against DAI, its owners, agents and affiliates.[2] Petitioner Michael Johnson filed his lawsuit in North Carolina state court on April 8, 1993. Prior to filing suit, Mr. Johnson had been actively participating in arbitration with DAI. After petitioners' counsel filed suit on behalf of Mr. Johnson in state court, Mr. Johnson refused to take any further part in the arbitration.

In response to each of the Illinois and North Carolina state court actions, DAI promptly filed a demand for arbitration with the American Arbitration Association ("AAA"). When each franchisee refused to comply with DAI's arbitration demand, DAI filed separate petitions in the United States District Court for the District of Connecticut to compel

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[2] Counsel for these franchisees and for petitioners here later filed three more lawsuits on behalf of Subway franchisees against DAI and others in the Madison County Circuit Court during the spring and summer of 1994. To say that all of the Illinois petitioners were "forum-shopping" in filing suit in Madison County would be an understatement: each petitioner in those actions works in metropolitan Chicago, which is about 300 miles away from Madison County; the only Illinois parties in those cases are from the Chicago area; and none of the facts of any of the cases has the slightest connection to Madison County. *See Distajo I*, 66 F.3d at 441.

arbitration under Section 4 of the FAA, 9 U.S.C. § 4.[3] The District Court eventually consolidated those petitions and others (a total of sixteen) under the caption *Doctor's Associates, Inc. v. Distajo, et al.*

From the outset, petitioners' strategy was to delay resolution of DAI's Section 4 petitions for as long as possible, in order to seek rulings on arbitrability favorable to petitioners from the state courts before the District Court could compel arbitration.[4] For example, petitioners filed over 20 briefs in the District Court setting forth a series of tenuous arguments challenging the court's authority to hear the case. As a result of petitioners' dilatory tactics, the parties were forced to brief the same issues more than ten times. Petitioners' counsel frankly admitted during a hearing in the Madison County court that the Illinois petitioners were in a "race to the courthouse" and wanted to obtain a ruling from the state court that the Illinois actions were not arbitrable before the District

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[3] Because a petition to compel under Section 4 may be brought only in the federal district with jurisdiction over the contractually designated site of arbitration and because petitioners' franchise agreement with DAI calls for arbitration in Bridgeport, the District of Connecticut was the only forum where DAI could properly file its petitions. *See, e.g., Merril Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995); *Snyder v. Smith*, 736 F.2d 409, 420 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *Maria Victoria Naviera, S.A. v. Cementos Del Valle, S.A.*, 759 F.3d 1027, 1031 (2d Cir. 1985); *Lawn v. Franklin*, 328 F. Supp. 791, 793 (S.D.N.Y. 1971).

[4] This Court has recognized that the intent of the FAA was to provide for "rapid and unobstructed enforcement of arbitration agreements". *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). Section 4 requires an "expeditious and summary hearing, with only restricted inquiry into factual issues", *Moses H. Cone*, 460 U.S. at 22, and contemplates a decision on arbitrability in "very short order". *Id.* at 22, 23 nn. 26 & 27. Owing to petitioners' tactics and the District Court's congested docket, however, it became impossible for the court to comply with these statutory mandates. DAI filed its first petition in March 1994, but the court was not able to issue its decision compelling arbitration until almost eight months later.

Court could compel arbitration. Respondents' Appendix ("R. App.") A-3.

In one respect, petitioners' efforts to thwart DAI's right to an expedited and summary resolution of its petitions to compel arbitration worked. For on October 24, 1994, over seven months after DAI filed its first Section 4 petition in the District Court, and about two weeks before the District Court ultimately granted those petitions, the Madison County Circuit Court ruled in the Illinois cases that the arbitration clause in the Subway franchise agreement was unenforceable. *Distajo I*, 66 F.3d at 449. DAI timely filed a motion for reconsideration, and that motion is still pending before the state court. *Id.*

The North Carolina state court also entered two orders before the District Court could rule on DAI's Section 4 petitions. R. App. A-4–A-10. In the North Carolina action, DAI had filed a motion under Section 3 of the FAA to stay the lawsuit brought by petitioner Johnson in favor of arbitration, and a separate motion to dismiss. In the motion to dismiss, DAI contended that Mr. Johnson had waived his right to challenge the arbitration agreement because he had previously participated in an arbitration with DAI. The North Carolina trial court summarily denied each of DAI's motions. However, the court did not determine whether the arbitration clause in the Subway franchise agreement was enforceable. Instead, the court held only that Mr. Johnson had not waived his right to contest the validity of the arbitration clause. R. App. A-8; *see Distajo I*, 66 F.3d at 450-51.

2. On September 29, 1994, the District Court denied each petitioner's motion to dismiss DAI's Section 4 petition. R. App. A-11–A-19. As is relevant to the Petition, the court rejected petitioners' argument that it should abstain from deciding DAI's petitions. Following this Court's decision in *Moses H. Cone*, 460 U.S. at 13-14, the District Court recognized that "only exceptional circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court." R. App. A-15. The court concluded that

petitioners had "not enumerated exceptional circumstances that warrant dismissal in deference to the state court litigation." R. App. A-15.

After receiving additional briefs, the District Court granted DAI's 16 petitions to compel arbitration. *See Doctor's Associates, Inc. v. Emily Distajo, et al.*, 870 F. Supp. 34 (D.Conn. 1994). The District Court expressly rejected petitioners' claim that because the Madison County Circuit Court had decided that the arbitration clause was unenforceable, the full faith and credit statute, 28 U.S.C. § 1738, prevented the District Court from granting DAI's petitions. *Id.* at 36. The District Court concluded that under Illinois law, Illinois courts would not give preclusive effect to the state court's ruling because DAI still had the right to appeal. *Id.* Because the Illinois ruling was not "final" for *res judicata*/collateral estoppel purposes under Illinois law, it was not entitled to full faith and credit. *Id.*[5] Each petitioner then appealed to the Second Circuit.

3. Less than a month after the District Court had compelled arbitration in the 16 Distajo actions, petitioners' counsel filed yet another lawsuit on behalf of two more Chicago-area franchisees -- Sandra and Raymond Bickel -- once again in the Madison County state court. DAI promptly filed in the District Court a petition to compel arbitration pursuant to Section 4 of the FAA. Nevertheless, on the day that he received notice that the District Court had scheduled a hearing on DAI's petition and acting without any notice to DAI, petitioners' counsel moved the Madison County Circuit Court for an order of default for failure to appear against DAI. The court entered a default the same day, once again without notice to DAI. Among other things, the Madison County Circuit Court purported to hold, through the default, that the arbitration clause in the Subway franchise agreement was not

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[5] The District Court also entered an injunction enjoining petitioners from further litigation of their state court actions. The injunction was entered to effectuate the District Court's judgment compelling arbitration. *Distajo*, 870 F. Supp. at 36.

enforceable. *Distajo I*, 66 F.3d at 449. DAI timely filed a motion to set aside the default.

On February 13, 1995, the District Court granted DAI's petition to compel the Bickels to arbitrate in accordance with their arbitration agreement and issued an injunction identical to the *Distajo* injunction barring further litigation of the Bickels' state court action. *See Distajo I*, 66 F.3d at 444. The Bickels appealed the District Court's ruling, and their appeal was consolidated for oral argument with the previously pending appeal of the Distajo franchisees.

4. On September 12, 1995, the Second Circuit issued a decision upholding virtually all of the District Court's rulings. Specifically, the Second Circuit affirmed the District Court's ruling that the state court decisions did not preclude the District Court from ruling on DAI's petitions. In deciding this issue, the court recognized that "a federal court must 'give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" *Id.* at 446 (citations omitted). Because under Illinois law an Illinois trial court judgment is not final, and thus not entitled to preclusive effect, until all appellate rights have been exhausted, the Second Circuit held that the District Court properly concluded that it was not required to give preclusive effect to these decisions. *Id.* at 449-50.[6] The Second Circuit also affirmed the District Court's decision not to abstain. Finally, the Second Circuit remanded two issues to the District Court for additional consideration: (1) whether the arbitration

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[6] The Second Circuit also rejected petitioner Johnson's claims regarding the scope of the North Carolina state court ruling. "In North Carolina . . . collateral estoppel only precludes the relitigation of issues that were actually and necessarily decided in the earlier action." *Distajo I*, 66 F.3d at 450 (citations omitted). The Second Circuit observed that the written orders of the North Carolina court "did not explain why it denied the stay [under Section 3 of the FAA]", nor did they "make any findings of fact or conclusions of law regarding the arbitration clause." *Id.* at 450. Therefore, these rulings did not bar the District Court from compelling Mr. Johnson to arbitrate in accordance with his agreement with DAI. *Id.* at 450-51.

clause was a product of fraud; and (2) whether DAI waived its right to arbitrate the dispute of any defendant.

Petitioners filed a Petition for Writ of Certiorari seeking review of the Second Circuit's rulings regarding *res judicata*/collateral estoppel and abstention. The Court denied the Petition. *Distajo I*, 116 S. Ct. 1352 (1996).

5. After remand from the Second Circuit, petitioners resumed their tactics and rush for judgment in the state court actions. Thus, on November 17, 1995, before the Second Circuit's mandate had issued and while petitioners were still enjoined from prosecuting their state court actions,[7] the Bickels moved the Madison County court for a $400,000 judgment on the default that had previously been entered against DAI. Despite the fact that no proceedings had taken place in the Bickels' state court action since February 1994, on December 6, 1995, one day after the District Court issued a temporary restraining order barring petitioners from further litigation in the state lawsuits,[8] the Madison County court entered an order denying DAI's motion to set aside the default judgment and awarding the Bickels $400,000. Petitioners' Appendix ("Pet. App.") A-54–A-56. DAI timely appealed that judgment.

On March 14, 1996, the District Court issued its final judgment rejecting petitioners' remaining defenses to arbitration that had been remanded from the Second Circuit and granting each petition to compel arbitration. The court found as a fact that DAI had not procured the arbitration agreement by fraud and that DAI had not waived its right to compel arbitration of these disputes. The District Court also rejected the

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[7] The Second Circuit's mandate vacating the District Court's injunction did not issue until November 22, 1995.

[8] Because it was clear that petitioners intended to do everything they could to thwart the District Court's jurisdiction on remand, DAI was forced to seek a temporary restraining order preventing litigation in the state court actions until the District Court could consider the issues remanded by the Second Circuit. The District Court granted a TRO and a preliminary injunction, which is the focus of the Petition in No. 97-145.

Bickels' claim that the December 6, 1995 default judgment in their state court action required the District Court to abstain from ruling on the issues that had been remanded by the Second Circuit. As the court noted "[t]he Bickels' abstention claim is just a slightly modified version of the res judicata/collateral estoppel argument that this court and the Second Circuit have previously rejected." *Doctor's Associates, Inc. v. Distajo, et al.*, 944 F. Supp. 1010, 1022 (D.Conn. 1996), *citing Distajo I*, 66 F.3d at 449-50. Because an Illinois judgment is not entitled to preclusive effect until all appeals have been exhausted, the default judgment (which was still on appeal) was not final and did not prevent the District Court from granting DAI's petition. The District Court also rejected the Bickels' argument that the default judgment constituted "substantial proceedings" warranting abstention under this Court's ruling in *Moses H. Cone*, *supra*. As the court noted, "the Illinois judgment was entered almost immediately and without an evidentiary hearing. Such action does not constitute relatively substantial proceedings, as meant by *Moses H. Cone*, when compared with the Second Circuit's *Distajo* ruling and this court's plethora of decisions, in the consolidated case over the last two years." 944 F. Supp. at 1022-23.

6. Petitioners once again appealed to the Second Circuit, which affirmed each of the District Court's rulings. *Distajo II*, 107 F.3d at 139. With regard to the Bickels' abstention claim, the court held that the Bickels had "failed to articulate any persuasive reason why abstention would be proper in this case." *Id.* at 138. The court also affirmed the District Court's holding that the default judgment did not constitute substantial proceedings warranting abstention. *Id.*

Finally, the Second Circuit rejected petitioners' argument, raised for the first time on appeal, that the *Rooker-Feldman* doctrine, which holds that "a United States District Court has no authority to review final judgments of a state court," deprived the District Court of subject matter jurisdiction. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). The Second Circuit found that DAI was not seeking appellate review of any of the state court decisions because "DAI filed its

petitions to compel arbitration . . . before the state courts had made any rulings on the merits . . .” 107 F.3d at 138. Accordingly, the *Rooker-Feldman* doctrine had no application to this case. The court also noted that there was no legal authority for the proposition that the *Rooker-Feldman* doctrine could “deprive a district court of subject matter jurisdiction over a petition to compel arbitration under [the FAA].” *Id.* After the Second Circuit rejected petitioners’ petition for rehearing and suggestion for rehearing *en banc*, they filed this Petition.

## REASONS FOR DENYING THE PETITION

The Court should deny the Petition on each issue raised. Neither the abstention nor *Rooker-Feldman* arguments raised in the Petition present any compelling legal issues. Petitioners do not claim that the Second Circuit applied the wrong legal standard on either issue or that the Second Circuit’s decision conflicts with any decision of this Court or of other circuit courts. Rather, petitioners merely disagree with the Second Circuit’s application of settled legal doctrines to the particular facts of this case. In view of the unique facts and (in the words of the Second Circuit) “tangled proceedings” of this case, those fact-bound determinations by the Second Circuit were unquestionably correct. In any event, neither issue presents any questions that warrant this Court’s review.

### I. The Second Circuit’s Affirmance of the District Court’s Decision To Exercise Its Discretion Not To Abstain Does Not Warrant Review.

This Petition arises out of an unique procedural history and involves a highly unusual set of facts. Since there is no dispute or conflict as to the correct legal principles at issue and since it is clear that petitioners’ abstention claim turns largely on the uncommon facts of these cases, there is no reason for

the Court to grant petitioners' request to review the District Court's exercise of discretion not to abstain in this case.[9]

Abstention is a narrow exception to the general rule that requires a district court to adjudicate cases properly before it. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (citations omitted). Only exceptional circumstances will justify a district court in abstaining from the exercise of this duty; and the mere pendency of a parallel state court proceeding is insufficient to warrant abstention in light of a district court's "unflagging obligation . . . to exercise the jurisdiction given [it]." *Id.* at 817. Furthermore, abstention will rarely, if ever, be appropriate in a case, such as this, involving a petition to compel arbitration under the FAA.

Thus, in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), this Court held that it was plain error for the District Court to abstain from ruling on a petition to compel arbitration despite the existence of a previously filed state court action. As this Court noted, abstention in such circumstances is contrary to the strong federal policy favoring arbitration and the FAA's intent to provide for "rapid and unobstructed enforcement of arbitration agreements." *Id.* at 22-26.

> The basic issue presented in [the] federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or

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[9] Petitioners raised identical abstention claims in *Distajo I*, where they argued that the Illinois court judgments holding the arbitration clause unenforceable required the District Court to abstain from ruling on DAI's petitions. Both the District Court and the Second Circuit rejected this argument, R. App. A-15, *Distajo I*, 66 F.3d at 458, and this Court denied petitioners' Petition for Writ of Certiorari. *Distajo I*, 116 S. Ct. 1352 (1996). Here, petitioners make the identical claim with regard to the default judgment in the Bickel case. This Court should deny this Petition for the same reasons that it denied the Petition in *Distajo I*.

> federal court . . . [O]ur task in cases such as this is not to find some substantial reason for the **exercise** of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest justifications," that can suffice under *Colorado River* to justify the **surrender** of that jurisdiction. Although in some rare circumstances the presence of state law-issues may weigh in favor of that surrender . . . the presence of federal law issues must always be a major consideration weighing against surrender.

*Id.* at 24-26 (emphasis in original).

Given this Court's holding in *Moses H. Cone*, it is not surprising that petitioners do not cite a single case that conflicts with the District Court's decision to exercise jurisdiction in this case. Indeed, Petitioners do not claim that either the District Court or the Second Circuit applied the wrong legal standard in determining that abstention was inappropriate in this case. Rather, they argue only that on the particular facts of this case the default judgment obtained by the Bickels constituted "substantial proceedings" in the state court that required the courts to abstain under *Moses H. Cone*. Petition ("Pet.") 14. That fact-specific issue does not require review by this Court. Moreover, petitioners' argument is wrong for two reasons.

*First*, *Moses H. Cone* makes it quite clear that whether substantial proceedings have taken place in state court is only one of many factors that are relevant to a district court's exercise of discretion to abstain. *Moses H. Cone*, 460 U.S. at 19-29. Here, petitioners' arguments for abstention are directed only to the proceedings in the District Court **after** remand from the Second Circuit. Pet. 12-15. The District Court was more than justified in exercising its discretion not to abstain at that late stage of this case, regardless of the nature of the proceedings in state court, in view of the extensive proceedings that had occurred in the District Court during the nearly two years that this case was pending in that court and the fact that the case

was before that court with instructions from the Second Circuit to decide petitioners' two remaining defenses to arbitration. 460 U.S. at 22 (where federal court "had taken most of the steps necessary to a resolution of the arbitrability issue," abstention was plain error). As the Second Circuit aptly observed below, petitioners simply have not "articulated any persuasive reason why abstention would be proper in this." *Distajo II*, 107 F.3d at 138.

*Second*, the Second Circuit correctly determined on the basis of the factual record that the "Illinois default judgment, entered without an evidentiary hearing, does not constitute 'substantial' state proceedings warranting abstention under *Moses H. Cone*." *Id. See United States v. Johnston*, 268 U.S. 220, 227 (1925) (Court will not review fact based decisions) and *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (same). No proceedings of any substance had taken place in the Illinois court, and it issued the default judgment in contravention of the District Court's TRO, which petitioners' counsel neglected to bring to the state court's attention. *Distajo II*, 107 F.3d at 137. As the Second Court recognized, to allow the Bickels to obtain a default judgment in violation of the District Court's TRO and then use that judgment as a means to deprive the District Court of its jurisdiction to decide issues on remand would be the height of unfairness and would deprive DAI of its federal right under the FAA to "rapid and unobstructed enforcement of [its] arbitration agreement." *Moses H. Cone*, 460 U.S. at 23.[10]

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[10] Petitioners' cursory reference to *Younger* and *Pennzoil* does not support their cause. *Younger* involved abstention in deference to a parallel state criminal action and reflects this Court's recognition of a state's unique interest in enforcing and applying its criminal laws. *Younger v. Harris*, 401 U.S. 37, 45 (1971). *Pennzoil* rested in large part on this Court's interest in avoiding unnecessary constitutional litigation by first allowing a state court to rule on a plaintiff's claims. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). Neither doctrine has any relevance here. Thus, the Petition fails to present any conflict of law worthy of review.

## II. The Second Circuit's Determination That The *Rooker-Feldman* Doctrine Did Not Apply To This Case Does Not Warrant Review.

The Second Circuit's ruling that the *Rooker-Feldman* doctrine did not deprive the District Court of subject matter jurisdiction over DAI's petitions to compel arbitration was based on the application of a well-settled legal doctrine to the "tangled proceedings" and unique facts of this case. Petitioners do not claim that there are any conflicts among the circuits, and it is clear that there are no compelling legal issues worthy of this Court's review.

As the Second Circuit recognized, the *Rooker-Feldman* doctrine stands for the simple and narrow proposition that federal district courts have only original jurisdiction and, therefore, do not have authority to review final judgments of state courts. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Gash Assoc. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993). The fundamental purpose of the doctrine is to prevent federal district courts from exercising **appellate** jurisdiction over a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). Accordingly, the *Rooker-Feldman* doctrine applies only if the federal court plaintiff is attacking a prior state court judgment. *Gash*, 995 F.2d at 728.

Here, the Second Circuit correctly determined that DAI's petitions to compel arbitration were not appeals from any state court judgment. As to the Illinois actions, the record is undisputed that DAI filed its petitions to compel arbitration **before** the Illinois court entered any of its judgments. Even in the case of the Bickels, the Illinois default judgment was not entered until after the District Court had entered a TRO after remand in *Distajo I. Distajo II*, 107 F.3d at 138; *see* Pet. 15. Thus, by definition, DAI's petitions did not seek review of any Illinois state court judgment. *Id.* at 137-38. *Pennzoil Co. v. Texaco, Inc.*, 784 F.2d 1133, 1144 (1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

As to petitioner Johnson, the North Carolina court's denial of DAI's motions to dismiss and stay did not result in a judgment regarding the enforceability of DAI's arbitration clause. The court merely determined that Mr. Johnson had not waived his right to challenge the arbitration clause; the court made no findings of fact or conclusions of law regarding the arbitration clause itself or DAI's conduct. *Distajo I*, 66 F.3d at 450. As a result, DAI's federal court petition seeking an order compelling arbitration was not an appeal from the North Carolina court's findings and in no way attacked that decision. Nor did DAI claim to have been injured in any way by the North Carolina court's rulings. *See Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996) (*Rooker-Feldman* doctrine applies where federal plaintiff alleges an injury arising out of a state court judgment).

DAI's petitions were filed pursuant to the FAA and sought enforcement of DAI's federal right to arbitrate. The District Court clearly had subject matter jurisdiction over this dispute and no subsequently entered non-final ruling by the state courts could deprive the District Court of its jurisdiction over DAI's petitions. Petitioners do not cite a single case that has applied the *Rooker-Feldman* doctrine to deprive a district court of subject matter jurisdiction over a petition to compel arbitration under the FAA. Where, as here, a party to a valid arbitration agreement has filed petitions to compel arbitration under the FAA in federal court immediately upon notice of the adverse parties' claims and **before** any state court rulings regarding the arbitration clause, the *Rooker-Feldman* doctrine has no application, and the strong federal policy favoring arbitration requires the federal court to exercise jurisdiction over the petition and enforce the arbitration agreement rapidly and without obstruction or delay. *See Moses H. Cone*, 460 U.S. at 23; *Distajo II*, 107 F.3d at 138.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Attorneys for Respondent*
*Doctor's Associates, Inc.*

Dated September 23, 1997

# APPENDIX

**Appendix A**

IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

| | | |
|---|---|---|
| MIKE (MUSHTAQ) KANCHWALA, ANVER KANCHWALA, and AZIM HAMANI, | ) | |
| Plaintiffs, | ) | |
| -vs- | ) | No. 95-L-1291 |
| DOCTOR'S ASSOCIATES, INC., FREDERICK A. DELUCA, PETER H. BUCK, JOANN BACHEWICZ and SUBWAY RESTAURANTS, INC., | ) | |
| Defendants. | ) | |

REPORT OF PROCEEDINGS

*HEARING ON MOTIONS*

BEFORE THE HONORABLE A. A. MATOESIAN, CIRCUIT JUDGE PRESIDING

*APPEARANCES:*

Mr. David M. Duree
Attorney at Law
812 N. Collins, Laclede's Landing
St. Louis, Missouri 63102-2174
Appearing for Plaintiffs

Mr. Theodore J. Williams, Jr.
and
Mr. David G. Loseman
Attorneys at Law
One Metropolitan Square
St. Louis, Missouri 63102
Appearing for Defendants

*DATE:* October 13, 1995

Dorothy Warren, C.S.R.
Official Court Reporter
C.S.R. =084-001421

going forward with the other case. So when I said before Judge O'Neill in the summer of 1994 that it was a race to the courthouse, what I said was an accurate statement of the law. There is no question here that my clients prefer to have their rights as Illinois franchisees, which include claims under the Illinois Franchise Disclosure Act; that they prefer to have those rights decided by the courts in Illinois. It is beyond question that the franchisor, Doctor's Associates, Inc., prefers to have its rights decided by the federal court in Connecticut and/or arbitrators in Connecticut. There is no dispute about that. It is, in fact, a race to the courthouse. But there's nothing illegal, immoral, or improper about the fact that's what the law is, because we have a dual system of jurisprudence. We have the federal system. We have the state system. And we are in that area of the law where which court rules first has great significance of what the final outcome of the case will be. So I make no apologies for asking this Court to rule on my motions before this Court, before the court in Connecticut can rule on similar motions and simultaneously issue an injunction prohibiting me from going forward with this court.

THE COURT: I understand your position.

MR. WILLIAMS: But the problem is simply this. In the other cases we had a right to argue our forum motion; albeit

[end of excerpt]

**Appendix B**

[Filed May 3, 1994]

| | |
|---|---|
| STATE OF NORTH CAROLINA<br>COUNTY OF GASTON | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>FILE NO. 93 CVS 1324 |

Michael Johnson,
Plaintiff,
vs
Doctor's Associates, Inc., et al
Defendants.

ORDER

FINDINGS OF FACT:

1. This action was commenced by the Plaintiff's filing a complaint seeking damages for misappropriation of funds;

2. The Plaintiff is a franchisee of several Subway Sandwich store franchises in North Carolina. Doctor's Associates is the franchisor;

3. The franchise agreement contains an arbitration clause which provides as follows:

> C. Any controversy or claim arising out of, or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the commercial arbitration of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut, or whichever City in which the company is then headquartered, and judgment upon an award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of, or relating to this contract is a condition precedent to the commencement of legal action by either party.

4. In his complaint, Plaintiff alleges that the arbitration clause is void for illegality, lack of mutuality and fraud;

5. The Defendant Doctor's Associates, Inc., has filed a Motion to Dismiss for failure to state a claim and, in the alternative, a Motion to Stay the Proceedings pending completion of arbitration proceeding;

6. The hearing on these motions was held before the undersigned Judge;

7. After the hearing, the Court entered an order denying the Motion to Dismiss for failure to state a claim and ordering the parties to file supplemental briefs and affidavits on the issue of whether the Plaintiff waived his right to litigate by participating in arbitration;

Based on the evidence presented at the hearing, and as set forth in the supplemental affidavits, and after having considered the arguments of counsel, the Court makes the following additional findings of fact:

1. Doctor's Associates filed a demand for arbitration with the American Arbitration Association (AAA) on or about the 26th day of January 1993;

2. Attorney David W. Smith, III, acting on behalf of the Plaintiff, filed an answer and counterclaim on February 10, 1993, and also submitted a five hundred dollar administrative fee to the AAA;

3. In his answer the Plaintiff denied the allegations in Doctor's Associates' statement for arbitration and in his counterclaim, sought an award of damages based on his contention that an employee of Doctor's Associates had misappropriated the Plaintiff's funds. Plaintiff did not challenge the validity of the arbitration clause or object to the jurisdiction of AAA to arbitrate the parties' claims;

4. On April 7, 1993, Plaintiff filed an objection to the jurisdiction and authority of the AAA to proceed with arbitration. The basis for the objection was that the arbitration

provision in the franchise agreement was void and unenforceable because of illegality, lack of mutuality and fraud;

5. On April 14, 1993, pursuant to Rule 8 of the Commercial Arbitration Rules of the AAA, Plaintiff filed a motion with the AAA to amend its counterclaim. The motion was filed "under protest" and specifically set forth the bases on which the Plaintiff contested the jurisdiction of the AAA to arbitrate the matters. On the same date, the Plaintiff filed with the AAA a motion to appoint additional arbitrators;

6. The AAA is currently holding the matter in abeyance pending the decision of this Court on whether the parties are required to arbitrate or may litigate the issues in dispute;

7. To this point, the AAA has appointed one arbitrator but it has not ruled on the Plaintiff's motions to appoint additional arbitrators or the Plaintiff's motion to file an amended counterclaim;

8. The parties have not exchanged exhibits or witness lists nor has any evidence been taken in the arbitration;

BASED ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSION OF LAW:

1. This Court has jurisdiction over the parties and the subject matter of this order;

2. The Plaintiff's limited participation in the arbitration proceedings did not constitute a waiver of his right to challenge the enforceability of the arbitration clause;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Doctor's Associates' motions to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in arbitration are denied.

This the 3rd day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

## Appendix C

[Filed May 18, 1994]

| | |
|---|---|
| NORTH CAROLINA<br>GASTON COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>93-CvS-1324 |

MICHAEL JOHNSON,
Plaintiff,
vs.
DOCTORS ASSOCIATES, INC., a Florida Corporation (f/k/a DOCTORS ASSOCIATES, INC., a Connecticut Corporation); FREDERICK DELUCA, an individual; PETER BUCK, an individual; FRANCHISE WORLD HEADQUARTERS, INC., a Connecticut Corporation; PETER SLOMIANYJ, an individual; NORTH CAROLINA SUBWAY GROUP, INC., a North Carolina Corporation; DOUGLAS BENTELLE, an individual; SHEILA HALLETT, an individual; SANTO RHODES, an individual; MICHAEL ARMELLINO, an individual; and NANCY TIMMONS, an individual;
Defendants.

***AMENDED ORDER***

Pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure, the May 3, 1994 Order entered in the captioned matter is hereby amended as follows:

1. Paragraph 5 of the Findings of Fact (beginning on page 1 of the Order) is stricken and is replaced with the following:

5. The Defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., have filed Motions to Dismiss for failure to state a claim and, in the alternative, Motions to Stay the Proceedings pending completion of arbitration proceedings;

2. Paragraph 7 of the Findings of Fact (on page 2 of the Order) is stricken and is replaced with the following:

7. After the hearing, the Court ordered the parties to file supplemental briefs and affidavits on the issue of whether Plaintiff waived his right to litigate by participating in arbitration;

3. The final paragraph of the Order is stricken and is replaced with the following:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motions brought by all moving Defendants -- Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj and North Carolina Subway Group, Inc., -- to dismiss or to stay these proceedings on the grounds that Plaintiff has waived his right to litigate the issues that are the subject of this action by participation in the arbitration are denied.

4. The May 3, 1994 Order shall remain the same in all other respects.

This the 17 day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

## Appendix D

[Filed May 18, 1994]

| | |
|---|---|
| NORTH CAROLINA<br>GASTON COUNTY | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>93-CvS-1324 |

MICHAEL JOHNSON,
Plaintiff,

vs.

DOCTORS ASSOCIATES, INC., a Florida Corporation (f/k/a DOCTORS ASSOCIATES, INC., a Connecticut Corporation); FREDERICK DELUCA, an individual; PETER BUCK, an individual; FRANCHISE WORLD HEADQUARTERS, INC., a Connecticut Corporation; PETER SLOMIANYJ, an individual; NORTH CAROLINA SUBWAY GROUP, INC., a North Carolina Corporation; DOUGLAS BENTELLE, an individual; SHEILA HALLETT, an individual; SANTO RHODES, an individual; MICHAEL ARMELLINO, an individual; and NANCY TIMMONS, an individual;
Defendants.

***ORDER***

---

THIS MATTER coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the February 28, 1994, Gaston County Civil Term of Court upon Motions to Dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; such

Motions being brought by defendants Doctors Associates, Inc., Frederick Deluca, Peter Buck, Franchise World Headquarters, Inc., Peter Slomianyj, and North Carolina Subway Group, Inc., by their respective counsel; and it appearing to the Court after arguments by counsel for all parties involved that the Complaint does state a claim;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the moving Defendants' Motions to Dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure be and hereby are denied.

This the 17 day of May, 1994.

/s/ John Mull Gardner
Superior Court Judge Presiding

## Appendix E

[Filed Sept. 29, 1994]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| DOCTOR'S ASSOCIATES, INC. | : | |
| -vs- | : | Civil No. 3:94CV00349 (PCD) |
| EMILY DISTAJO, ET AL. | : | |

*RULING ON PENDING MOTIONS*

Plaintiff filed a petition to compel arbitration pursuant to the Federal Arbitration Act (FAA) 9 U.S.C. § 4, and subsequently an application for a Temporary Restraining Order and a Preliminary Injunction. Defendants have filed various motions to dismiss, to transfer, and for a hearing on the matter.

*BACKGROUND*

Plaintiff Doctor's Associates, Inc. (DAI) is the national franchisor of "Subway" sandwich shops, and is a Florida corporation. DAI entered into written franchise agreements with defendants, permitting them to operate a Subway restaurant. The agreements contain an arbitration clause (paragraph 10c) which reads as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out or relating to this contract is a condition precedent to the commencement of legal

> action by either party. The cost of such a proceeding will be borne equally by the parties.

Defendants have filed suit against plaintiff, affiliated individuals and entities in various state courts. Plaintiff demanded arbitration of defendants' claims by the American Arbitration Association in accordance with the arbitration clause. Defendants have refused to arbitrate, and therefore plaintiff petitions here for an order directing defendants to arbitrate. Plaintiff moved for a temporary restraining order and for a preliminary injunction to stay the state court proceedings until this court could rule on the petitions to compel arbitration. On September 13, 1994 a hearing was held as to whether a preliminary injunction should enter. The temporary restraining order has expired.

*DISCUSSION*

1) *Motions for a Hearing*

Plaintiff's motions for a hearing on the petition to compel arbitration and on the motions to dismiss are denied.

2) *Motions to Dismiss*

A motion to dismiss under Rule 12(b)(6) must be decided solely on the facts alleged. *Goldman v. Belden*, 754 F.2d 1059, 1065–66 (2d Cir. 1985). Such a motion should be granted only where no set of facts consistent with the allegations could be proven entitling plaintiffs to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The issue is not whether plaintiffs will prevail, but whether they should be afforded the opportunity to offer evidence to prove their claims. *Id.*

A) *Local Rule 9*

The motions to dismiss filed in 3:94cv00370 *Doctor's Associates v. Smith* (doc. #5) and 3:94cv00369 *Doctor's Associates v. Gillon* (doc. #7) are denied for failure to file an accompanying memorandum of law as required by Local Rule 9.

B) *Subject Matter Jurisdiction*

Several of the defendants claim that this court does not have jurisdiction over the subject matter of the action because there is not complete diversity, as certain development agents of DAI doing business in the same states that defendants reside must be joined as plaintiffs in the various actions.[1] However, they are not parties to the contract that is at issue in the instant action. "Fed.R. Civ.P. 19 does not require the joinder of parties merely because they played some part in the underlying events of a dispute, but only if such parties are necessary in order to grant complete relief or if they would be prejudiced by not being joined." *Argo Partners, Inc. v. Littlefield, Adams & Co.*, 1994 WL 320616 (S.D.N.Y.). "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration

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[1] Defendants in 3:94cv00515 *Doctor's Associates v. Youmaran*, 3:94cv00803 *Doctor's Associates v. Brenes*, 3:94cv00514 *Doctor's Associates v. Guerro*, 3:94cv00516 *Doctor's Associates v. Shino*, 3:94cv00517 *Doctor's Associates v. Loenneke*, 3:94cv00349 *Doctor's Associates v. Distajo*, 3:94cv01457 *Doctor's Associates v. Papaleo* and 3:94cv01456 *Doctor's Associates v. Rothmund* are residents of Illinois. They allege that Phil Mesi and Subway Development of Chicagoland, Inc., both development agents of DAI and residents of Illinois, are indispensable parties under Fed.R.Civ.P. 19(b). Defendants in 3:94cv00998 *Doctor's Associates v. Kane* are residents of Massachusetts. They allege that Michael and Jane Eslinger and Jams, Inc., development agents of DAI and residents of Massachusetts, are indispensable parties. Defendant in 3:94cv00803 *Doctor's Associates v. Johnson* is a resident of North Carolina. He alleges that Peter Slomianyj and North Carolina Subway Group, development agents of DAI and residents of North Carolina, are indispensable parties. Defendant in 3:94cv1108 *Doctor's Associates v. Giannini* is a resident of Pennsylvania. He alleges that J.B. Jung and Subway Development Corporation of Philadelphia, development agents of DAI and residents of Pennsylvania are indispensable parties. Defendants in *Doctor's Associates v. McCrary*, *Doctor's Associates v. Gillon*, *Doctor's Associates v. Smith*, *Doctor's Associates v. Riise*, and *Doctor's Associates v. Benton* are residents of Alabama. They allege that Bernardo Frausto and Subway Development of Northern Alabama, development agents for DAI and residents of Alabama are indispensable parties.

agreement." *Moses H.Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (1983). *See also Steinberg & Lyman v. Takacs*, 774 F. Supp. 885 (S.D.N.Y. 1991) (parties to an arbitration agreement must arbitrate even though there are other defendants to the action). There would be no prejudice to the various development agents by not joining them, as they are not parties to the agreement in question and the underlying litigation would proceed as to those parties even if the litigation as to Doctor's Associates and the defendants in this action was stayed. This action to enforce an agreement by the defendants to arbitrate does not require joinder of the additional parties.

The motions to dismiss in 3:94cv00349 *Doctor's Associates v. Distajo* (doc. #s 31, 33, 35, 37, 39 and 46) are denied in their entirety, as they relate solely to this issue of subject matter jurisdiction.

C) *Personal Jurisdiction/Venue*

Defendants contend that this court lacks personal jurisdiction over them and that venue is not proper.[2] These arguments are without merit. In accordance with the arbitration agreement, defendants "subjected [themselves] in advance, to the jurisdiction of the court within whose territorial jurisdiction the arbitration proceedings are to be had . . . ." *Hatzlachh Supply Inc. v. Moishe's Electronics, Inc.*, 828 F. Supp. 178, 185 (S.D.N.Y. 1993) (vacated on other grounds, *Hatzlachh Supply, Inc. v. Moishe's Electronics, Inc.*, 848 F. Supp. 25

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[2] Defendants assert this argument in the following cases:

3:94cv00515 *Doctor's Associates v. Youmaran*
3:94cv00998 *Doctor's Associates v. Kane*
3:94cv00514 *Doctor's Associates v. Guerro*
3:94cv00803 *Doctor's Associates v. Brenes*
3:94cv01108 *Doctor's Associates v. Gianni*
3:94cv00516 *Doctor's Associates v. Shino*
3:94cv00517 *Doctor's Associates v. Loenneke*
3:94cv00349 *Doctor's Associates v. Distajo*
3:94cv00803 *Doctor's Associates v. Johnson*

(S.D.N.Y. 1994)); *Farr & Co. v. Cia. Intercontinental De Navegacion De Cuba*, 243 F.2d 342, 346 (2d Cir. 1957). The arbitration agreement also includes a choice-of-forum clause, stating that the parties are to settle any disputes in Connecticut. Such advance consent waives any objection to personal jurisdiction and venue.

D) *Abstention*

Defendants contend, in a conclusory manner, that this court should decline to exercise jurisdiction over the matter under the doctrine of abstention, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-17 (1976).[3] Federal courts generally do not dismiss proceedings merely because the same matter is being litigated in state court. Only exceptional circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13-14 (1983). Defendants claim that proceedings in over nine cases in state courts constitute compelling circumstances. There is nothing remarkable about parallel state litigation. Although it is not entirely clear how extraordinary the circumstances must be in order for the court to decline to exercise its jurisdiction in this context, it is clear that parallel proceedings alone is not sufficient. *See Id.*; Erwin Chemreinsky, *Federal Jurisdiction* at 669 (4th ed. 1989) (listing cases in which courts abstained due to varying circumstances). Defendants have not enumerated exceptional circumstances that warrant dismissal in deference to the state court litigation.

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[3] The following defendants assert this argument:

3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #4)
3:94cv00803 *Doctor's Associates v. Brenes* (doc. #4)
3:94cv00514 *Doctor's Associates v. Guerro* (doc. #4)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #6)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #5)
3:94cv00349 *Doctor's Associates v. Distajo* (doc. #18 )
3:94cv00998 *Doctor's Associates v. Kane* (doc. #3)
3:94cv01108 *Doctor's Associates v. Gianni* (doc. #4)

E) *Res Judicata and Collateral Estoppel*

Defendant in *Doctor's Associates v. Johnson* alleges that res judicata or collateral estoppel precludes jurisdiction here over the matter because the North Carolina trial court in which a complaint was filed declined to stay the lawsuit. These orders are on appeal, and therefore they do not constitute a final judgment on the merits. Therefore res judicata does not apply. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel applies only to issues decided finally in another forum. *Jim Beam Brands Co. v. Crawford, Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991). Even if these orders were to be considered final, a denial of a motion to stay does not preclude a petition to compel arbitration pursuant to § 4 of the FAA. *See In re Pahlberg Petition*, 131 F.2d 968, 969 (2d Cir. 19 ).

Defendants in *Doctor's Associates v. McCrary* allege that an Alabama state court has determined the arbitration clause to be void and unenforceable and therefore these issues may not be relitigated in this forum. There is currently pending a motion to reconsider the judgment in the state court. Consequently, there is not a final judgment, as discussed above, and the doctrines of res judicata and collateral estoppel do not apply.

4) *Motion for Preliminary Injunction*

Plaintiffs move for a preliminary injunction to enjoin defendants from moving forward with their respective cases in state court. Defendants claim that this court cannot grant the relief requested under the provisions of 28 U.S.C. § 2283 (the "Anti-Injunction Act").

The Anti-Injunction Act was promulgated to balance the tensions between state and federal courts in a dual system, eliminating inevitable friction that may occur when both state and federal courts entertain proceedings. As the Supreme Court has noted, state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state

appellate courts and ultimately this Court." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970).

Injunctions can issue against state proceedings in certain limited situations, "namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). The exceptions are narrow and "'not [to] be enlarged by loose statutory construction.'" *Id.* (quoting *Atlantic* 398 U.S. at 146). As there is neither statutory authority for entry of an injunction nor a judgment which the court seeks to effectuate, the question is whether this court can enjoin the state court proceedings in aid of its jurisdiction.

In the present action, the state and federal court have concurrent jurisdiction and consequently neither court is "free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic* 398 U.S. at 295.

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by application of the principles of res judicata.

*Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977). Additionally, the Supreme Court has limited the "in aid of jurisdiction" exception only to cases in which a federal court acquires jurisdiction over real property, but has not extended it to proceedings involving *in personam* jurisdiction. *Atlantic* 398 U.S. at 295-96. As the state court proceedings do not impair this court's jurisdiction to proceed, and there is no dispute as to real property, an injunction is not appropriate.

Exceptions to the Anti-Injunction Act recognized in the Second Circuit also do not apply to the present situation. The Act has been found not to apply when state court proceedings have not been instituted. *Standard Microsystems v. Texas*

*Instruments*, 916 F.2d 58, 61 (2d Cir. 1990). However, each of the consolidated cases have pending litigation in a state court, and the act bars "an injunction to stay *proceedings* in a State court." 28 U.S.C. § 2283 (emphasis added). The Second Circuit has cast doubt as to the validity of another exception formulated in the Seventh Circuit in *Barancik v. Investors Funding corp.*, 489 F.2d 933 (7th Cir. 1973), which allowed an injunction if the state court proceedings were instituted after a motion was filed to enjoin it, but before the court ruled on it. *See Standard Microsystems*, 916 F.2d at 61. The facts here do not support such an argument as the state court litigation was commenced prior to plaintiff's application for a preliminary injunction.

The motion for a preliminary injunction (doc # 59) is denied as the action does not fall within any of the narrow exceptions to the Anti-Injunction Act. Accordingly, defendants' motions to file responsive pleadings in state court are granted.

*Conclusion*

The following motions to dismiss are denied:

3:94cv00349 *Doctor's Associates v. Distajo* (doc. #s 4, 18, 31, 33, 35, 37, 39, 46, 53, 84, 86, 89)
3:94cv00369 *Doctor's Associates v. Gillon* (doc. #7)
3:94cv00370 *Doctor's Associates v. Smith* (doc. #5)
3:94cv00511 *Doctor's Associates v. Brenes* (doc. #4)
3:94cv00514 *Doctor's Associates v. Guerro* (doc. #4)
3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #4)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #6)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #5)
3:94cv00803 *Doctor's Associates v. Johnson* (doc. #3)
3:94cv00948 *Doctor's Associates v. Kane* (doc. #3)
3:94cv01108 *Doctor's Associates v. Gianni* (doc. #4)
3:94cv01457 *Doctor's Associates v. Papaleo* (doc. #5)

The following motions for a hearing are denied:

3:94cv00349 *Doctor's Associates v. Distajo* (doc. # 21 & 50)
3:94cv00354 *Doctor's Associates v. McCrary* (doc. # 9)
3:94cv00369 *Doctor's Associates v. Gillon* (doc. # 9)

3:94cv00370 *Doctor's Associates v. Smith* (doc. # 8)
3:94cv00371 *Doctor's Associates v. Riise* (doc. # 10)
3:94cv00372 *Doctor's Associates v. Benton* (doc. # 8)
3:94cv00511 *Doctor's Associates v. Brenes* (doc. #8)
3:94cv00514 *Doctor's Associates v. Guerrero* (doc. #8)
3:94cv00515 *Doctor's Associates v. Youmaran* (doc. #8)
3:94cv00516 *Doctor's Associates v. Shino* (doc. #7)
3:94cv00517 *Doctor's Associates v. Loenneke* (doc. #8)

The following motions to file documents in pending state proceedings are granted: *Doctor's Associates v. Distajo* 3:94cv00349 (doc. #s 72, 73, 74, 77, 78, 79, 80). The motion for leave to file a supplemental memorandum of law in support of the motion to dismiss for lack of venue 3:94cv00511 *Doctor's Associates v. Brenes* (doc. #7) is granted, and was considered. The motion to transfer venue, *Doctor's Associates v. Distajo* 3:94cv00349 (#8), is denied. The motion for a preliminary injunction *Doctor's Associates v. Distajo* 3:94cv00349 (#59) is denied.

Any responsive pleadings to the petitions to compel arbitration shall be filed on or before October 14, 1994. The petitions shall be decided on the record as of that date.

SO ORDERED.

Dated at New Haven, Connecticut, this 29th day of September, 1994.

/s/ Peter C. Dorsey
United States District Judge